FILE COPY

IN THE

Supreme Court of the United States

No. 697

Term, 194

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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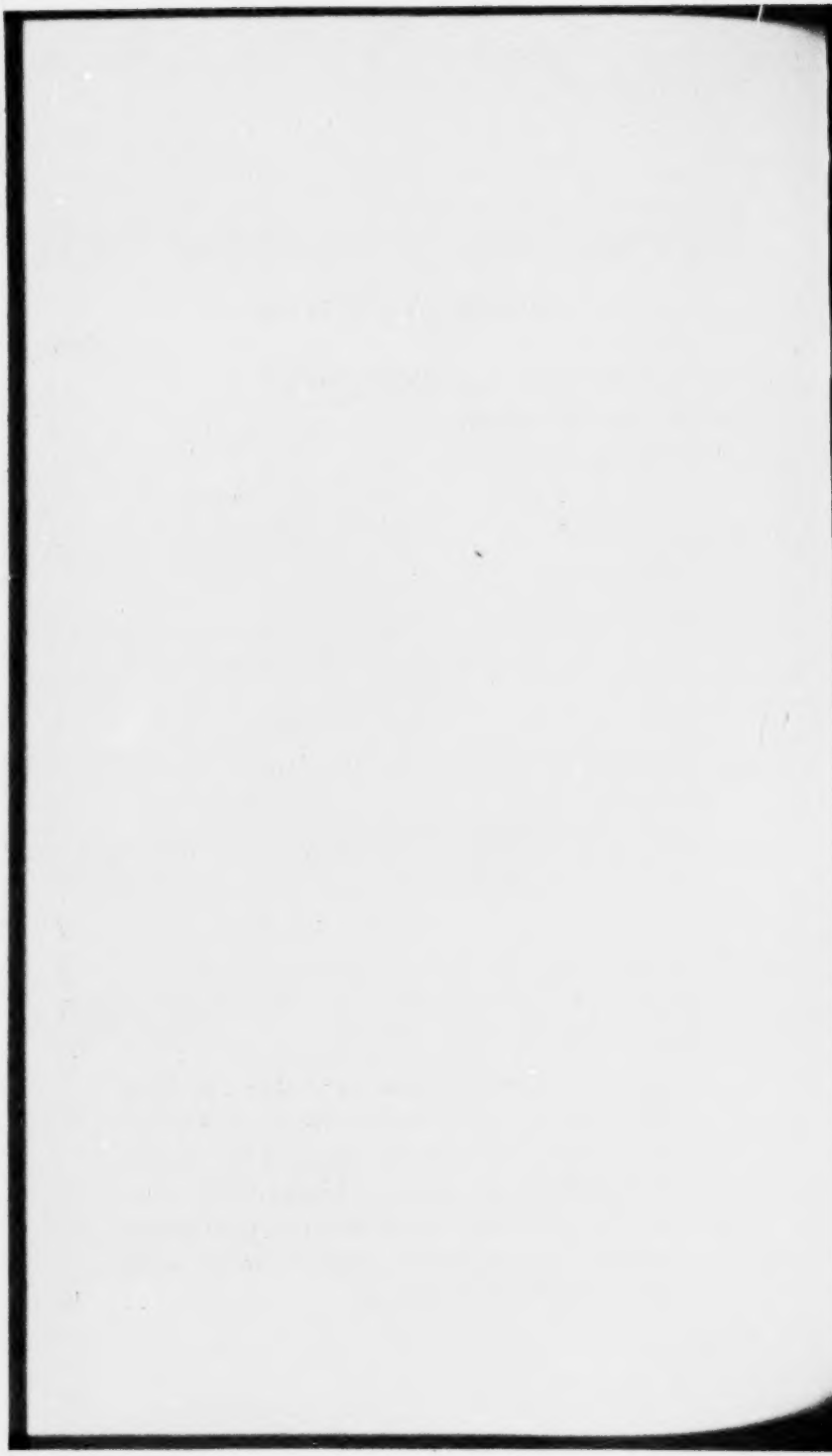

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IN THE

Supreme Court of the United States.

No. . TERM, 19 .

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, respectfully petition this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an equitable action by the Federal Deposit Insurance Corporation to recover from the defendants an alleged deficiency on a certain note after selling to itself most of the collateral with the note; there was an oral

agreement as to time of payment of the note but the Court found against the defendants as to the note because of indefiniteness as to time of the agreement. The Trial Court specifically, however, found there was no fraud. Judgment was entered against the defendants. A motion for new trial was made and refused. An appeal, assigning various errors of the Chancellor, was taken to the Circuit Court, which affirmed the judgment as a matter of law, holding the case was controlled by the decision in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447. A petition for certiorari was refused by this Court, 327 U. S. 799.

The motion for new trial in the lower Court was thereafter renewed because of after-discovered evidence; and then an application to the Circuit Court of Appeals for permission on the part of the District Court to hear the same. The application was declined, as was a motion for reconsideration of said application.

The basis of the application to the Circuit Court was after-discovered evidence. which petitioners contended was sufficient to take this case out of the rule of the D'Oench, Duhme decision (supra). This evidence consisted of the testimony of one John Pellini, Jr., who was absent from the country at the time of trial and in actual combat service from early in 1943 until sometime in 1946. His depositions were taken and transcribed by the court stenographer to the effect that he personally knew the loan in 1936 was extended for another ten years, that in 1936 a new note was demanded by the Bank Examiner, that the original notes were not returned by the bank to the maker, Mr. Alker, until about six weeks after the new note was given to the bank in December, 1936; and the new notes when returned, bore the endorsements as to oral agreements as they now appear, as part of the record. This witness had been the office manager for Mr. Alker.

The after-discovered evidence further consisted of the depositions of Mr. C. B. Matzinger, a bank examiner, who

stated that he examined the closed bank's books for three years, acting in conjunction with the Federal Examiners; that this particular loan was discussed with the bank officials, as well as the large amount of insurance and the agreement as to the attorneys fees, deposited along with the other collateral, and that the bank officials advised the Examiners of the agreement as to this loan. This happened each year. Attention is called to the fact that none of these depositions have been made a part of the certified record of the proceedings before the Circuit Court although they were filed with the Court. Whether the Circuit Court had these depositions before it, when considering the application, is not clear from either the record or the opinion of the Circuit Court.

The after-discovered evidence also consisted of a public announcement that the F. D. I. C. had acted with various Philadelphia banks in making the loan to the Integrity Trust Company; that the collateral had been held for the benefit of itself and all the banks, and the Federal Deposit Insurance Corporation had acted as liquidator for all. The Federal Deposit Insurance Corporation further announced that the banks had been paid in full, and it had either paid itself or had enough in hand to pay itself.

The after-discovered evidence also consisted of the original notes, which had been found after Pellini's return, which notes bore a reference to the agreement. The Circuit Court in its decisions had ruled that there was no evidence in the records of the bank as to any agreement about this loan. This after-discovered evidence was offered to overcome that ruling.

The original notes themselves were found after the return of John Pellini, Jr., from overseas. One of these notes bore the endorsement:

> "For addtl collateral and agreement with Mr. Alker
> and A. A. DuBan
> see W. K. H."

and the other bore the endorsement:

"For addtl. collateral and agreement with Alker and
A. A. DuBan
see other note and W. K. H." *

and they were presented to the Circuit Court, together with an offer of proof that the endorsements had been placed thereon by the bank; that they were there when the new note of 1936 was prepared and executed by Alker and they were on the notes when the notes about six weeks later were returned to Alker.

The Circuit Court in refusing the application erroneously acted for the following reasons:

1. The facts in the case, being complicated and after-discovered evidence of a substantial character having been offered, the case should have been remanded to the District Court for a full and complete study of the after-discovered evidence and the taking of such further testimony as it might seem proper.

2. From its own record, it appears that the Circuit Court did not have before it the depositions of the witnesses that were taken.

3. By its action, the Circuit Court has denied the petitioners due process of law because they have been denied the right to present this highly important after-discovered evidence to the proper court.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, C. 229, Section 1, 43 Stat. 938; 28 U. S. C. A. 347 (a).

The motion for leave to file in the District Court of a petition for rehearing was finally denied by the Circuit Court on December 26, 1947.

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* The initials "W. K. H." in both endorsements refer to Walter K. Hardt, who had been the President of the Integrity Trust Co.

QUESTIONS PRESENTED.

1. The facts being complicated, and substantial after-discovered evidence having been brought to the attention of the Circuit Court, did the Circuit Court deny the defendants due process of law in refusing to direct the Trial Court to give a full hearing on the after-discovered evidence?

2. Did not the Circuit Court err in reaffirming its opinion that the matter was still controlled by *D'Oench, Duhme & Co. Inc. v. F. D. I. C.*, 315 U. S. 447, without affording the defendants a full opportunity to present to the Court of original jurisdiction all of the after-discovered evidence, where the after-discovered evidence indicated that the records of the insured bank do disclose that there was an agreement as contended by the defendants, the Circuit Court's decision being based on the theory that there was no such evidence.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Third Circuit has decided an important question contrary to both the statutes governing this matter and the decisions of this Court. *National Brake & Electric Company v. Christensen*, 254 U. S. 426; 65 L. E. 341; *Simmons Co. v. Grier Brothers Co.*, 258 U. S. 82; *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238.

2. The United States Circuit Court of Appeals for the Third Circuit in refusing the application has denied the defendants due process of law, because it has barred the defendants from a full and complete hearing of all the evidence in an equity proceeding.

3. The Circuit Court of Appeals for the Third Circuit erred in finding that the after-discovered evidence showed that the agreement was among the records of the bank for *only six days*, whereas the evidence offered showed that it

was there at *least six weeks* and how much longer defendants could not tell because the records of the bank were exclusively in the possession of the bank.

4. The United States Circuit Court of Appeals for the Third Circuit, because the facts are complicated, and there being substantial after-discovered evidence of a new character, erred and exceeded its authority in reaffirming its original decision, and in not referring the case back to the District Court for a complete rehearing on the after-discovered evidence.

PRAYER FOR WRIT.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the proceedings of the said United States Circuit Court of Appeals in the case at bar, and entitled on its Docket as No. 8805, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, appellants, v. Federal Deposit Insurance Corporation, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Court, and for such further relief as this Court may deem proper.

And your petitioners will ever pray.

HARRY J. ALKER, JR.,
MAMIE DUBAN, Individually, and
as Executrix of the Estate of
Alfred A. DuBan, Deceased,
by EDWIN HALL, 2nd,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The original opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 151 Fed. (2d) 907.

The opinion of the District Court is not reported, but is set forth in the Original Record at pages 475a-481a.

The opinion of the United States Circuit Court of Appeals on the petition in the nature of a bill of review is reported in 163 Fed. (2d) 123.

The opinion of the United States Circuit Court of Appeals on a petition for rehearing of the petition in the nature of a bill of review is reported in 164 Fed. (2d) 469.

The order of the United States Circuit Court of Appeals on defendants' motion for leave to file a petition for rehearing is not reported but is set forth in the Record on pages .

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).

The date of the order of the Circuit Court of Appeals denying the prayer of the petition of the defendants for leave to file a petition for rehearing is December 26, 1947.

STATEMENT OF THE CASE.

In 1929 Harry J. Alker, Jr., borrowed from the Integrity Trust Company about $600,000., giving his note therefor, and as security various collateral, worth far in excess of the loan. Later the Trust Company split the loan

and had Mr. Alker execute on May 25, 1931, two demand notes in favor of the Integrity Trust Company. The collateral depreciated and Alker and one DuBan loaned additional collateral to the bank and entered into certain agreements conditioned upon an agreement of forbearance by the Trust Company. The time of forbearance was later extended and a new note given in substitution of the first notes. The Trust Company closed. Before it had closed large loans were made to it by the plaintiff and various other banks; the Federal Deposit Insurance Corporation taking over as collateral for the benefit of itself and the said other banks, certain notes with the accompanying collateral. Alker and DuBan complied with their part of the agreement. The Federal Deposit Insurance Corporation, notwithstanding the agreement, which it had recognized for two years, called the loan, sold a large part of the collateral to itself (a large part of it for $1. per the lot of securities) and brought this equitable action to establish a deficiency and force the transfer of certain collateral. The District Court found in favor of the plaintiff on the ground that the agreement was too indefinite as to time, but found specifically that there was no fraud. An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which affirmed the finding of the District Court, basing its opinion, however, solely on the fact that the agreement was a secret agreement and came within the rule of *D'Oench, Duhme Co. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, and not passing on the other questions involved. An appeal was taken to your Honorable Court which refused a certiorari 327 U. S. 799.

Shortly after this John Pellini, Jr., who had been in the United States Army and overseas for three years, returned to Philadelphia. He had been Alker's office manager and confidential clerk, handling many of the details relating to the loan. The defendants also learned of a Mr. Matzinger, a former State Banking Examiner, who had examined the affairs of the Integrity Trust Company

for several years prior to the closing. The defendants at the trial and at the time of filing the petition for certiorari did not know his name, his whereabouts or even that there had been such a person. Then after John Pellini returned, the original notes, duly endorsed with a reference about the agreement, were found. Depositions of these witnesses were taken as well as others.

About this time there was a public announcement in the newspapers that sufficient funds had been realized from the assets of the closed bank so that all the local banks which had made loans to the closed bank had been repaid, and enough funds have remained for a long time to repay also the Federal Deposit Insurance Corporation in full, if they have not already done so. In that event the entire matter reverts to the State Receiver who could not avail itself of this defense.

The District Court felt an application should be made to the Circuit Court of Appeals for authority to the District Court to reconsider the motion for new trial. Application was so made. The Circuit Court considered the same and dismissed the petition, 163 Fed. (2d) 123. Application for reconsideration was presented and again refused 164 Fed. (2d) 469. A motion for leave to present a petition for rehearing was filed, and said motion was refused. This appeal was then taken.

ARGUMENT.

I. The Facts Here Being Complicated and Substantial After-Discovered Evidence Having Been Brought to the Attention of the Circuit Court Did the Circuit Court Deny the Defendant Due Process of Law in Refusing to Direct the Trial Court to Give a Full Hearing on the After-Discovered Evidence.

Apparently the Circuit Court of Appeals relied upon the majority opinion in *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238 for its method of acting upon this petition. In doing so, the Court failed to distinguish between the *Hartford* case (supra) and this case. In the Hartford case (supra) it was alleged that fraud had been perpetrated on the Circuit Court itself. Because of this allegation and the fact that it was not alleged that the fraud was perpetrated on the District Court, the Circuit Court retried the case itself. It was because of this feature alone that the Supreme Court in its 5-4 opinion sustained the Circuit Court, although the minority wrote a very strong opinion disapproving of this procedure. This is evident by footnote number 5 found at the bottom of page 245, which is as follows:

> "Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision."

In the present case the District Court specifically found there was no fraud. There was therefore no justification for a hearing on the merits by the Circuit Court as no fraud was practiced on the Circuit Court but on the contrary under the law and all decisions other than the *Hartford* decision (supra) (which as heretofore stated stood on its own facts because of the fraud on the Circuit Court) the motion should have been granted and the Dis-

trict Court directed to entertain the motion for new trial and consider all the after-discovered evidence. A hearing by the District Court would have enabled the defendants to have had a full opportunity to present the testimony in open Court subject to cross-examination. In only this way would the evidence be gotten before the proper Court for its full consideration. *Simmons Co. v. Grier Bros. Co.*, 258 U. S. 82; *National Brake & Electric Co. v. Christensen*, 254 U. S. 426, 65 L. E. 341.

The procedure as followed by the Circuit Court amounted to a denial to the defendants of due process of law because they were not given an opportunity to have the after-discovered evidence fully presented to and passed upon by the proper tribunal. The essential elements of due process of law are notice and an opportunity to be heard. *Boone v. Wachovia Bank & Trust Co.*, 163 Fed. Rep. 2nd 809, 816. The latter opportunity was denied to the defendants by the Circuit Court's action. The application before the Circuit Court was in the nature of a pro forma motion, not a hearing on the merits of the case.

II. Did the Circuit Court Err in Re-Affirming Its Opinion That the Matter Was Still Controlled by the Decision in D'Oench, Duhme Co. v. F. D. I. C., 315 U. S. 447 Without Affording the Defendants a Full Opportunity to Present to the Court of Original Jurisdiction All of the After-Discovered Evidence Where Such Evidence Indicated That the Records of the Bank Had Disclosed That There Was an Agreement as Contended by the Defendants, the Circuit Court's Decision Being Based on the Theory That There Was No Such Evidence.

While in the case of *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, it was held by the majority opinion that the Circuit Court in that case was justified in hearing the case because fraud existed, and that fraud was perpetrated upon that very Circuit Court, the minority opinion written

by Justice Roberts expresses the general rule as to all but such exceptional cases in which there was fraud, of which the *Alker* case is one (the District Court having found there was no fraud).

Justice Roberts in the case of *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, 271, well said:

> "On the question what amounts to a sufficient showing to move an appellate court to grant leave to file an appeal of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave but where the facts are complicated, it is often the better course to grant leave to allow available defenses to be made in answer to the appeal. In the present instance I think it would have been proper for the court to permit the filing of the appeal in the District Court where the rights of the parties to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved."

The case now before the Court was an equitable action by the Federal Deposit Insurance Corporation to collect on a note as to which there is an agreement that was beneficial to the bank. At the time of the trial the Court held no evidence was produced showing that the records of the bank contained a reference to the agreement. The Federal Deposit Insurance Corporation contended at the trial it was not bound by the agreement, the agreement being against public policy. (The case was tried on the theory that the Federal Deposit Insurance Corporation had loaned the Integrity Trust Company certain moneys and taken over for its own benefit various assets of the bank, including the note and collateral in question.)

After the trial of the case, the appeal, and the return of the case to the Circuit Court, John Pellini, former office

manager and employee of Alker, returned from the Army, having been overseas in actual combat service at the time of the trial and not available. He was thoroughly familiar with the whole transaction and on his return made a deposition that the bank officials had advised him of the agreement and that it had been extended for ten years from 1936. He was also familiar with the form of the notes and when the first note was returned to Alker. After the discovery of the notes an effort was made to take his deposition to the effect that in December, 1936, the new note was delivered to the Integrity Trust Comapny and it was not until more than six weeks thereafter that the original two notes were returned to Alker; thus proving that the old notes with the endorsements thereon were in the possession of the bank for at least that period of time. He also offered to prove that the new note of 1936 was given because the Bank Examiner who was examining the bank had requested the same; that the new note was given while the examiner was there, so that the old notes and the new note were there while he was there and examined by him. The testimony shows that the Federal Deposit Insurance Corporation relied entirely upon the examiners for its information.

The old notes were found after Pellini returned, having been lost, and on these old notes were endorsements as follows:

"For addtl collateral and agreement with Mr. Alker and A. A. DuBan
see W. K. H."

"For addtl. collateral and agreement with Alker and A. A. DuBan
see other note and W. K. H." *

John Pellini offered to testify that these endorsements were on said notes when the notes were returned to Alker by the bank.

Only recently a man who was a former Bank Examiner was discovered at Easton, Pa., who had examined the

* The initials "W. K. H." in both endorsements refer to Walter K. Hardt, who had been the President of the Integrity Trust Co.

Integrity Trust Company for the State Banking Department for several years prior to the closing. He, his name and whereabouts were unknown to defendants at the time of the trial, and he was only located recently by accident. He appeared and offered a deposition that the Integrity officials had advised the Examiners about the agreement relating to the Alker note and advised the Examiners why they had made the agreement. He subsequently on reflection offered to appear again and offer more detailed valuable testimony if the Court would permit it.

It was further learned after the trial of the case by a public announcement by the Federal Deposit Insurance Corporation that the Federal Deposit Insurance Corporation did not hold the note and collateral for its own benefit but for the benefit of itself and various other banks who had loaned the Integrity money and were familiar with and had ratified the agreement; that the Federal Deposit Insurance Corporation was merely a liquidator for all of them and therefore not an innocent holder for value. This fact was not known until the Federal Deposit Insurance Corporation disclosed it in public print. No statement as to it was made by the Federal Deposit Insurance Corporation at the trial of the case. The testimony shows that the other banks had representatives on the Board of Directors and Executive Committee of the Integrity Trust Company, and one of their number, Mr. Gest, who acted as the dean of the representatives of those banks, had discussed and approved the agreement a number of times.

The Federal Deposit Insurance Corporation announced in the public print that it has paid itself in full its loan or has more than sufficient in hand to pay itself in full. This being the case it has and has had for a considerable period of time no further interest in this matter. This matter would revert or should have reverted to the Secretary of Banking, Receiver in Charge of the Integrity Trust Company. The Integrity Trust Company was a party to the agreement and it approved of it and benefited by it. It has

never repudiated it. It therefore would have no defense and the case should have been remitted by the Circuit Court for a hearing and determination of this question.

The Circuit Court in dismissing the motion reiterated its opinion that this case was controlled by the *D'Oench, Duhme* case, to wit: that reference to the agreement did not appear on the records of the bank for sufficient time and that the Federal Deposit Insurance Corporation was not bound by it, it being against public policy—all of this despite the fact that there was a finding that there was no fraud connected with it; that testimony was now offered or proposed to be offered that the record for at least six weeks showed the agreement; that the Bank Examiner was there at the time and saw the old notes and the new note with their respective endorsements; that the Bank Examiner was the agent of the Federal Deposit Insurance Corporation in the matter. The Circuit Court further had the testimony of the Bank Examiner who testified that the very nature of the collateral itself was notice, to wit:—the assigned fees, and insurance policies; that the officials of the bank had advised the Examiners of the agreement for at least three years.

III. The Circuit Court Did Not Give Proper Consideration to or Fully Comprehend the Evidence Submitted.

That the Circuit Court did not give proper consideration to, or fully comprehend the evidence which defendants offered in support of their petition, is shown by the many misstatements by the Court and inaccuracies in its opinion in 164 Fed. 2nd 469, some of which are as follows:

Alker did not contend, as alleged by the Circuit Court in 164 F. 2nd, 469, 470, "the legends quoted *were typed* by the Trust Company on the two original notes at or about the time when the new consolidated note, dated December 11, 1936, was delivered to him by the Trust Company." On the contrary Alker contended (1) the legends were placed on the original notes by the trust company—itself—just when he did not know; (2) they were there when the new

consolidated note dated December 11, 1936, was requested and given—because the representative of the bank said he was protecting Alker on the agreement by the endorsement on the new note in accordance with endorsements on the first notes. They were there when the notes were returned to Alker. Alker did not contend the notes with the legends on them were in the bank records six days. Alker contended, on the contrary, they were there, so far as he knew, at least six weeks—how much longer he did not know because they were the records of the bank to which he had no access. A period of at least six weeks elapsed, according to Alker and Pellini between the time the new note was given and the return of the old notes to Alker. How long the endorsements were on the original notes which were in the possession of the bank, the defendants would not know as the notes were in the exclusive possession of the bank.

The Circuit Court says erroneously that "the petitioners make no claim to the contrary that after the original notes were returned to Alker on or about December 11, 1936, (the evidence offered was that they were not returned until the latter part of January, 1937), the trust company had no record of the legends." On the contrary Alker offered to prove that the bank representative inserted on the new note on or about December 11, 1936, a legend carrying forward the legends which then appeared on the original notes, and therefore there was among the bank records a record of the legends and agreement.

An examination of the new note shows the Circuit Court also erroneously states "More than four years later" (after December 11, 1936) "the Trust Company assigned the consolidated note and the collateral with all its other banking assets, with certain immaterial exceptions, as security for a loan of about $20,000,000. made to it by the F. D. I. C. on the usual terms."

On the contrary the testimony offered by Alker was that the Federal Deposit Insurance Corporation recently announced that the collateral assigned was for the benefit

of itself and a number of other banks. This fact at no time was disclosed to the public until long after the trial. These banks had through their representatives approved the Alker agreement, and understood the agreement and the endorsement on the new note, and had seen the old notes and the endorsements. The Federal Deposit Insurance Corporation and these banks were partners in the transaction, and by reason of that fact alone the Federal Deposit Insurance Corporation was therefore bound by what they had done.

It was quite possible that the endorsements were on the notes when the photographic copies were taken, and that through defective photography the endorsements on the end of the notes were omitted. That this might well be, is proven by the copies of the notes attached to the printed record. There the back of the notes as they there appear are quite different from the back of the original notes (letters being out of place due evidently to poor photography). It is quite common for a photograph of an instrument to miss the marginal references, and the notations here were on the very end of the notes. Poor photography of checks was especially true in 1936 when the photographing of notes was in its infancy and very few banks had adopted the practice.

IV. The Facts Being in Dispute, the Circuit Court Either Should Have Held Hearings Before Deciding the Case, at Which the Witnesses Could Appear and Testify, or It Should Have Sent the Matter Back to the District Court for the Taking of Testimony and Decision.

The majority opinion of the Court in the *Hazel-Atlas* case (supra) page 244, well said:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. . . . This equity rule, which was firmly established in English practice long

before the foundation of our Republic, the Courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule" . . . "Where the occasion has demanded, where enforcement of the judgment is manifestly unconscionable, Pickford v. Talbott, 225 U. S. 651, 657, they have wielded the power without hesitation."

V. The Court Erred in Dismissing the Motion Without Hearing.

Here there was a conflict of facts. It was therefore the defendants' right to a hearing. The one body which could, in the absence of fraud perpetrated on the Circuit Court of Appeals, hear this testimony was the District Court. The matter should therefore have been referred to the District Court, and it was error not to have done so.

CONCLUSION.

For the foregoing reasons the defendants claim

(1) That they have been deprived of due process of law;

(2) That the facts being complicated and in dispute and difficult of ascertainment, the Circuit Court of Appeals should have remitted the matter to the District Court for hearing in accordance with the law in such cases made and provided;

(3) That the proofs offered show that the records of the bank did show the agreement and the case was therefore not controlled by the *D'Oench, Duhme* case; and that a petition for certiorari should be allowed.

Respectfully submitted,

EDWIN HALL, 2ND,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.

FILE COPY

IN THE

Supreme Court of the United States

No. 697.

October Term, 1947.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITIONERS' REPLY TO BRIEF OF FEDERAL DEPOSIT INSURANCE CORPORATION.

EDWIN HALL, 2ND,
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IN THE

Supreme Court of the United States.

No. 697 October Term, 1947.

HARRY J. ALKER, JR., AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED, PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONERS' REPLY TO BRIEF OF FEDERAL DEPOSIT INSURANCE CORPORATION.

To the Honorable Fred M. Vinson, Chief Justice of the United States Supreme Court, and Associate Justices:

The petitioners, because of certain misstatements made in the Brief of Respondent, beg leave to reply to some of them as follows:

1. In the Statement of the Case on page 3 of Respondent's Brief, the Respondent says:

> "Respondent acquired this note in January, 1940, together with all the other banking assets of Integrity Trust Company as security for a loan of some twenty million dollars made to it by Respondent."

The record shows that the Respondent on behalf of itself and various other Philadelphia banks acquired and

held the note, together with certain other assets as security for certain loans made by it and said banks, to the Integrity Trust Company, and Respondent acted as liquidator thereof for the benefit of all.

2. The Respondent on page 3 line 16 stated:

> "The District Court found that there was no such agreement (Former Record 479a)."

On the contrary the record shows that the District Court did not so find (Original record 479a). Furthermore, the Circuit Court held that there was an agreement.

3. The Respondent on page 4 line 8 of its Brief stated that the papers there referred to were misfiled by Alker. The record does not show this. On the contrary the record shows that they were misfiled by a former employe in Alker's office and were not located until August, 1947.

4. The Respondent on page 4 line 12 of its Brief stated:

> "He," (referring to Alker) "may have received them as late as six weeks after December 11, 1936."

Alker did not so contend. The record shows that Alker contended he received them more than six weeks after December 11, 1936.

5. The Respondent on page 5 line 12 of its Brief stated:

> "There is no evidence as to how or when or by whom the endorsements which now appear on the original 1931 notes were typed on them. The endorsements could not have been on the notes before December 4, 1936."

The record shows that they were placed thereon by the bank or a representative thereof and could have been on prior to December 4, 1936.

6. The Respondent on page 5 third line from the last stated:

> "There is no evidence that any bank examiner was in the bank in December 1936, or in January 1937."

The record shows that Alker was called by the bank, which advised him that the Banking Examiner was there, and that because the note was more than five years old, he had requested that a new note should be given; that the new note was given while the Banking Examiner was there. (Original record 202a, 471a.)

7. The Respondent on page 6 line 27 of its Brief stated:

> "Alker's counsel conceded at that hearing that the notation was not on the notes before December 4, 1936, and that the notes were returned to Alker shortly after December 11, 1936."

This is not in accord with the facts as the very application for leave to file the petition for re-hearing shows the following:

> "2. The Court overlooks the fact that the Federal Deposit Insurance Corporation relied upon the reports of the State Bank Examiners, one of whom saw or must have seen the old notes with the legends thereon and the new note with the legend thereon as it was one of the State Bank Examiners who insisted upon the new note, and the new note was given while he was there examining the assets of the institution when both sets of notes were in the possession of the Trust Company."
>
> • • •
>
> "7. The Court erred in stating on page 3 of the opinion 'after that date (December 11, 1936) the original notes with the legends were in Alker's files.'

That is not so. Alker was prepared to prove and is prepared to prove by his office manager who was overseas at the time of the trial, and for several years thereafter in combat service, that the original notes with the legends were not returned to Alker for some five or six weeks later after the new note was given on the said date."

8. Again on page 6 line 31 of Respondent's Brief it was stated:

> "Alker thus again had his day in court, and has conceded thereat that he cannot prove the only important contentions in this his latest petition to this Court."

Alker did not have his day in court and did not so concede as he was not given the opportunity to present the evidence of John M. Pellini, Jr., who was overseas at the time of the trial, engaged in combat service, and did not return from such service for almost two years after the original trial. Alker does not concede that the notation was not on the notes prior to December 4, 1936, but avers that they were on the notes for some time prior to the time that the new note was requested; and further avers and expects to be able to prove that the notes were not returned for more than six weeks after the date of the new note.

9. The Respondent on page 6, second line from the last of its Brief, stated:

> "He," (Alker) "has had a full trial before the United States District Court, followed there by a motion and supplemental motion for new trial and a subsequent attempt, after appeal, to have those motions reconsidered; he has been before the United States Circuit Court of Appeals three times and has unsuccessfully sought review in this Court; always with the same actual issues presented, with the same

controlling law applied and with the same adverse result to his contentions."

Petitioners aver that this is not so. They assert that John M. Pellini, Jr, was overseas in combat service and his testimony could not be gotten; the existence and whereabouts of C. B. Matsinger, a former bank examiner, was unknown at the time of the trial and was not ascertained until long afterwards when the application was made to the Circuit Court. Furthermore, the existence of the first notes was not known until August, 1947; that, had they been produced at the trial and the testimony taken, the petitioners contend the finding would have been in their favor.

10. The Respondent on page 7 line 8 of its Brief stated:

"The petitions in the court below which he now attempts to bring before this Court for review, contain averments which could have been verified before they were made, but which were not, and which, as shown above, he now has conceded to be erroneous."

This is denied by the petitioners and petitioners expect to prove all the averments which they have made if a new trial be granted.

11. On page 7 line 12 of Respondent's Brief it was stated:

"We refer especially to the averment (R. 36, 53) that the notation on the old notes was placed on them before December 4, 1936, and were part of the records of the bank at the time of the bank examinations."

Petitioners believe and have always contended that the notations on the old notes existed thereon prior to their return to Alker by the bank; that they were placed thereon by the bank and that they were part of the records of the

bank at the time of the bank examinations. Petitioners further believe that the notations were placed on the old notes when the agreement was made.

12. Petitioners further contend that the time when the endorsements were put on cannot be determined from a comparison of the notes with the photostats as the photographing of bank records at that time was in its infancy and it was quite possible for the photostats not to catch all that appears on the original instrument.

13. On page 7 line 19 of Respondent's Brief it was stated:

> "The dates of the bank examinations are and have always been available to him" (Alker).

Petitioners aver that they were advised that the bank records were confidential and could not be seen by anyone.

14. Petitioners deny that their continued applications are frivolous. On the contrary they aver that they feel that they have been greatly aggrieved and are right in their position and have been so advised by each and every counsel who appeared for them; all of whom are called upon for advice in the matter when necessary; this proceeding being conducted by Alker's own office—he being a lawyer with office associates.

15. As to whether the Federal Deposit Insurance Corporation holds the note and collateral for its own benefit or for the benefit of itself and certain banks, the official public announcement made by the Federal Deposit Insurance Corporation as set forth in the record states the Federal Deposit Insurance Corporation's position in the matter.

16. On page 8 of Respondent's Brief it is stated that the Respondent's loan to the integrity has not been paid in full, nor does it have sufficient cash in hand to pay itself in full. The petitioners were prepared to offer evidence

that the Philadelphia Liquidator of the Federal Deposit Insurance Corporation, in the presence of its counsel, stated to a reputable attorney at law representing a general claim against the Integrity Trust Company that the Respondent had realized sufficient to pay the other banks and pay itself in full. The petitioners were prepared and are prepared to offer evidence to this effect to the District Court if and when a new trial is granted.

Respectfuly submitted,

HARRY J. ALKER, JR.,
MAMIE DUBAN, individually, and as Executrix of the Estate of Alfred A. DuBan, Deceased.

EDWIN HALL, 2ND,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.

FILE COPY

No. 93

IN THE

Supreme Court of the United States

October Term, 1947

HARRY J. ALLEN, JR., and MARIE DuBAR, Individually and as Executrix of the Estate of Alfred J. DuBar, Deceased, *Petitioners*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

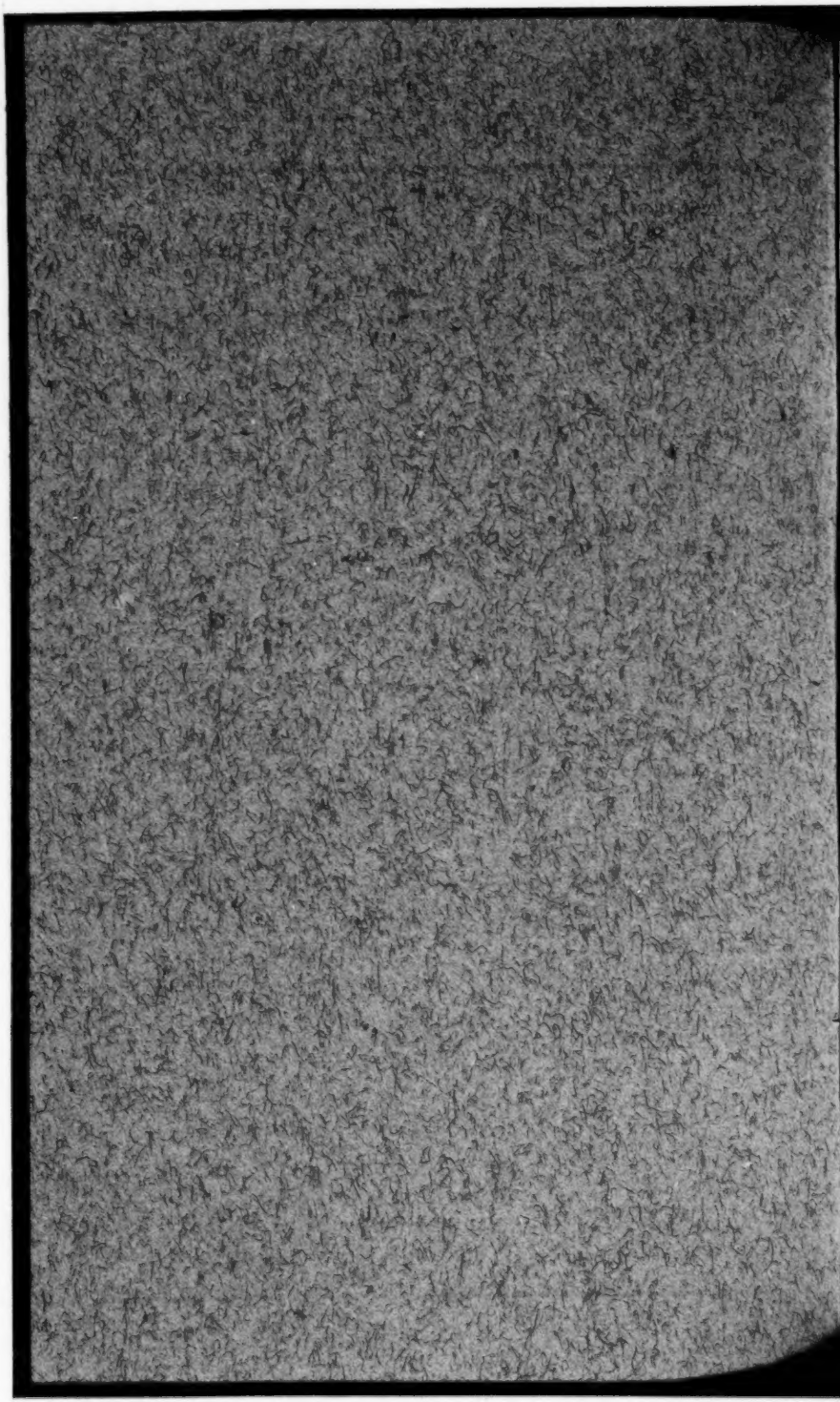
On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION.

NORMAN C. BAKER,
Associate General Counsel
Federal Deposit Insurance Corporation,

ALLAN S. OLMSTED, 2ND,
JOHN L. CECIL,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 697.

HARRY J. ALKER, JR., and MAMIE DUBAN, Individually and as Executrix of the Estate of Alfred A. DuBan, Deceased, *Petitioners,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW AND PREVIOUS RULINGS OF THIS COURT.

The opinion of the trial court (Former Record, 475a-481a), the United States District Court for the Eastern District of Pennsylvania, is not reported.

The original opinion of the United States Circuit Court of Appeals for the Third Circuit is reported at 151 F. (2d) 907.

The previous rulings of this court are reported as follows:

Petition for certiorari denied, 327 U. S. 799.
Petition for rehearing denied, 328 U. S. 877.
Second petition for rehearing denied, 328 U. S. 879.
Motion for leave to file a third petition for rehearing denied, 328 U. S. 881.
Motion for leave to file a fourth petition for rehearing denied, 329 U. S. 823.
Motion for leave to file a fifth petition for rehearing denied, 329 U. S. 830.

The opinion of the United States Circuit Court of Appeals for the Third Circuit on Petitioner's application there for leave to file a bill in the District Court in the nature of a bill of review (R. 31) is reported at 163 F. (2d) 123.

The opinion of the United States Circuit Court of Appeals for the Third Circuit on the petition for rehearing on the foregoing application for leave to file a bill in the District Court in the nature of a bill of review (R. 56) is reported at 164 F. (2d) 469.

JURISDICTION.

The judgment sought to be reviewed was entered on November 25, 1947, by the Circuit Court of Appeals for the Third Circuit; a petition for rehearing was denied by that Court on December 26, 1947 (R. 66). The petition for a writ of certiorari was filed on March 25, 1948. Petitioners rely upon Section 240 (a) of the Judicial Code as amended (USC Title 28, Sec. 347 (a)).

QUESTION PRESENTED.

Whether in the circumstances of this case the Circuit Court of Appeals correctly refused to permit the reopening of this case on grounds of newly discovered evidence.

STATEMENT OF THE CASE.

Alker, one of the Petitioners, was indebted to Integrity Trust Company on two notes executed in 1931 and renewed by a new note dated December 11, 1936. Respondent acquired this note in January 1940, together with all the other banking assets of Integrity Trust Company as security for a loan of some twenty million dollars made to it by Respondent. Integrity was then closed and placed in receivership. Respondent sued Alker on this 1936 note in the United States District Court, Eastern District of Pennsylvania. After trial without a jury the court filed an opinion and entered judgment in favor of Respondent. Alker there contended that there had been an alleged oral agreement between him and the President of Integrity in 1931 to the effect that the bank would not call the note or sell the collateral. No reference to this alleged agreement was found in any written record of the bank. The District Court found that there was no such agreement (Former Record 479a). On appeal the Circuit Court of Appeals for the Third Circuit disposed of the case on the basis that the agreement, even assuming it to have been made precisely as Alker contended, would not constitute a defense because it was secret within the bar of *D'Oench, Duhme & Company* v. *Federal Deposit Insurance Corporation,* 315 U. S. 447. This opinion of the Circuit Court of Appeals is reported at 151 F. (2d) 907. This Court refused certiorari (327 U. S. 799), denied two Petitions for Rehearing (328 U. S. 877, and 879) and denied three Motions for leave to file additional Petitions for Rehearing (328 U. S. 881, and 823; 329 U. S. 830).

After the mandate went down to the District Court and on the basis of alleged newly discovered evidence, Alker filed a Motion for Reconsideration of his motions for a new trial which he had filed in that Court prior to appeal (R. 4). Because of doubts, *sua sponte,* on the part of the District Court as to its jurisdiction, action on this motion for Reconsideration was withheld until Alker could apply to the Circuit Court of Appeals for leave to file a Petition in the

nature of a bill of review in the District Court looking to a reopening of the judgment and a new trial (R. 4, 11). This was denied on July 30, 1947 (R. 31), the opinion being reported in 163 F. (2d) 123.

Thereafter Alker found, allegedly in August of 1947, among his own papers, two documents which were in his possession from 1936 on (and therefore at the time of trial) which allegedly had been misfiled by him. These documents were the originals of his two notes of 1931, *supra* (R. 42-43).

These original notes of 1931 had been returned to Alker by Integrity on or about December 11, 1936 (he contends that he may have received them as late as six weeks after December 11, 1936), but before they were returned photostatic copies of them were made and put in the bank's files (Former Record 439a). These photostatic copies were, without objection on the part of Alker, received in evidence at the trial, marked Exhibits 26 and 27 (Former Record 544a, 546a). These photostatic copies are not included in the present record, but copies thereof are included as Appendices I an II of this brief. On the back of Exhibit 26 are notations of payments on account, of which the last payment is dated 12/4/36.

The notes of 1931 now bear three markings which do not appear on the above photostats of them, but are otherwise identical with such photostats, viz., the signatures are stamped "cancelled" with the bank's cancellation stamp; the word "cancelled" is written in Alker's handwriting, across the face of the notes; on the back of the notes are typed the words—

> "For addtl. collateral and agreement with Mr. Alker and A. A. DuBan see W.K.H."

> "For addtl. collateral and agreement with Alker and A. A. DuBan see other note and W.K.H."

"WKH" are the initials of Walter K. Hardt, who was President of the bank in 1931, and who is alleged to have made the oral agreement. He had had no connection with the bank for 23 months before December 1936.

Upon the basis of these 1931 notes now so endorsed, which Alker contends he did not discover until August 1947, he applied to the Circuit Court of Appeals for rehearing of the petition denied by that Court on July 30, 1947. The Court granted the petition (R. 55) and at the rehearing examined the documents in open court, compared them with documents already in the Record, and, in the light of admissions of counsel, held that they would not distinguish this case from the *D'Oench, Duhme & Company* case, *supra*. This opinion (R. 56-59) is found in 164 F. (2d) 469. Then followed this present and latest petition for certiorari.

There is no evidence as to how or when or by whom the endorsements which now appear on the original 1931 notes were typed on them. The endorsements could not have been on the notes before December 4, 1936, because they do not appear on the photostats in the bank's files which showed an endorsement (Former Record 545a) of a payment on that date. Alker and Robert T. McCracken, Esquire, (who was his counsel at that stage of the proceedings) both having disavowed any fraud on the part of the bank or of Federal Deposit Insurance Corporation, the Circuit Court of Appeals proceeded on the assumption that they were placed there after December 4, 1936. McCracken advanced for the Court's consideration the theory that the bank typed on the endorsements at or about the time it cancelled the signatures when Alker signed the new note on December 11, 1936. Respondent advanced the theory that Alker's bookkeeper typed the endorsements at or about the time Alker wrote the word "cancelled" on the face of the notes.

The Circuit Court of Appeals following McCracken's assumption, held that the assumed fact that the bank held the old notes, with the endorsements, for *six days* could not take the case out of the rule in the *D'Oench, Duhme & Company* case. The result would be the same if we assume, as Alker now asks us to do, that the bank possessed the old notes, so endorsed, for *six weeks*. There is no evidence that any bank examiner was in the bank in December 1936, or in January 1937. The bank examination reports of June

4, 1937, May 2, 1938, and May 9, 1939 contain no reference to the alleged agreement (R. 47-52). The Federal Deposit Insurance Corporation acquired the note in January 1940. Integrity was closed on the basis of bank examinations made in 1939. The bank examiners who made the examinations testified at the original trial that they had found no record of the alleged agreement (Former Record 278a, 280a, 281a, 298a).

ARGUMENT.

The petition for rehearing in the court below (Paragraphs 11, 13 and 16) (R. 36) and defendant's reply to the answer thereto (first and third paragraphs) (R. 53-54) contain averments to the effect that the endorsements on the old notes were a part of the records of the bank at the time of the bank examinations. Had it appeared that Alker might be able to prove that fact, the Circuit Court of Appeals would have had to go on to consider whether this was after-discovered evidence within the meaning of that rule and whether the presence of the notes among the bank's records before 1936 would affect the authority of the *D'Oench, Duhme* case, in view of Justice Douglas' reference to "the vigilant eyes of the bank examiners" (*D'Oench, Duhme & Company* v. *Federal Deposit Insurance Corporation*, 315 U. S. 447, 460). The Court took the unusual step of calling for the production of the documents in open court and questioning counsel concerning them, with a stenographer to transcribe the answers. Alker's counsel conceded at that hearing that the notation was not on the notes before December 4, 1936, and that the notes were returned to Alker shortly after December 11, 1936. See opinion of Circuit Court of Appeals (R. 57) 164 F. (2d) 469, 470. Alker thus *again* had his day in court, and has conceded thereat that he cannot prove the only important contentions in this his latest petition to this Court.

Alker has indeed had many days in court. Running the gamut, with successive changes in counsel, he has had a full trial before the United States District Court, followed

there by a motion and supplemental motion for new trial and a subsequent attempt, after appeal, to have those motions reconsidered; he has been before the United States Circuit Court of Appeals three times and has unsuccessfully sought review in this Court; always with the same actual issues presented, with the same controlling law applied and with the same adverse result to his contentions.

The petitions in the court below which he now attempts to bring before this Court for review, contain averments which could have been verified before they were made, but which were not, and which, as shown above, he now has conceded to be erroneous. We refer especially to the averment (R. 36, 53) that the notation on the old notes was placed on them before December 4, 1936, and were part of the records of the bank at the time of the bank examinations. That the former averment was in error could be learned by mere comparison of the notes found in Alker's files with the photostats thereof, Exhibits 26 and 27—Appendices I and II hereto (Former Record 544a-547a). The dates of the bank examinations are and have always been available to him; most of them are already in the record (Former Record 277a, 297a, 307a; present Record 47-51). Under such circumstances his continued new applications to the courts take on a character of the frivolous. Nevertheless it is felt that certain of the statements, though not germane, should not remain unchallenged of record; they are briefly as follows:

Alker now contends (Petitioners' Brief page 17) that the endorsements on the 1931 notes, which he now claims to be newly discovered evidence, may have been on those notes all the time and may have been omitted from the photostats presented to the trial court "through defective photography." This proposition he seeks to bolster by a reference to an error of the printer (his own printer) in showing in the original printed record another endorsement on one of the same notes in the middle instead of on the top of the page. This printer's error will be found at page 547a of the former Record. The actual photostat

which was introduced at the trial shows this other endorsement where it is on the original—at the top of the page. As to how and when the endorsements here in question got on the notes at all, the Circuit Court of Appeals (opinion in 164 F. (2d) supra, at page 471) did not find it necessary to explore because of the dispositive effect of the *D'Oench, Duhme & Company* case.

Equally frivolous is the suggestion that the rule in the *D'Oench Duhme & Company* case does not apply because Federal Deposit Insurance Corporation "did not hold the note and collateral for its own benefit but for the benefit of itself and various other banks who had loaned the Integrity money" (Petitioners' Brief, page 14), some of the officers of some of which banks he states had knowledge of the alleged agreement. The argument—fallacious on its face—is contradicted by the second paragraph on page 2 of the agreement between Federal Deposit Insurance Corporation and the banks (R. 18).

Still more frivolous is the argument that Respondent "announced in the public print that it has paid itself its loan in full or has more than sufficient in hand to pay itself in full" (Petitioners' Brief, page 14). The newspaper article in question is not part of the record, although it, too, was submitted to the Circuit Court of Appeals on brief. Respondent's loan has not been paid in full, nor does it have sufficient cash in hand to pay itself in full, nor does the newspaper announcement contain any statement to that effect. If and when respondent's loan shall have been paid in full (respondent expects that it will have been so paid during 1948) the remaining pledged assets, including this judgment, if it has not been collected in the meantime, will revert to the statutory receiver of Integrity Trust Company (R. 21).

CONCLUSION.

We respectfully submit that the decision of the Court below is correct, and that its decision involves no federal question of substance or general importance which remains

unsettled by this Court. Petitioners have not demonstrated that the case warrants the allowance of a writ of certiorari; the petition for a writ should, therefore, be denied.

Respectfully submitted,

NORRIS C. BAKKE,
Associate General Counsel
Federal Deposit Insurance Corporation.

ALLEN S. OLMSTED, 2ND,
JOHN L. CECIL,
Attorneys for Respondent.

Appendix 1.

Philadelphia, Pa., May 26 1931

ON DEMAND, for Value Received, I promise to pay to the order of

Bearer

Two Hundred & forty two thousand one Hundred fifty ($242,150.00) DOLLARS,

with interest, having deposited as collateral security for the payment of this note and of any other liability or liabilities to the holder hereof, due or to become due, or that may be hereafter contracted, whether direct or contingent, and whether now or hereafter acquired, the following property, viz.:

Two Sh. National Dairy Products Collateral

Pledged

with the right on the part of the holder hereof to repledge the securities above mentioned, or to substitute or exchange for the same other certificates of like tenor and amount, and also from time to time to demand additional collateral security, and upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to the holder hereof, or assigns, in case of such default, or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole or any part of such securities, or any substitutes therefor or additions thereto, at any broker's board, or at public or private sale, at the option of the holder, at any time or times thereafter, without advertisement or notice to the undersigned, and with the right on the part of the holder hereof to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption; and after deducting all legal and other costs and expenses of collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder hereof shall deem proper, returning the overplus to the undersigned; and the undersigned will still remain liable for any amount so unpaid; it being further understood and agreed that the holder shall have a like lien upon any and all funds, moneys, balances, stocks, bonds, notes, and other property at any time in the hands of the holder belonging to the undersigned, or to any endorser or guarantor hereof, as security for this note and for any and all liability or liabilities to the holder matured or unmatured, or that may be hereafter contracted, whether direct or contingent and whether now or hereafter acquired, of the undersigned or any endorser or guarantor hereof; which lien shall be enforceable in like manner and shall be subject to all the provisions herein above and before mentioned and set out.

In the event of an application for the appointment of a Receiver for the undersigned or any party hereto, or the making of a general assignment by or the filing of a petition in bankruptcy by or against, the undersigned, or any guarantor or endorser of this note, or any party hereto, or of any other act of insolvency of any of said parties, however expressed or indicated, all the aforesaid liabilities shall without notice, at the option of the holder, become immediately due, without demand for payment thereof.

It is further agreed that upon any transfer of this note, the holder may deliver the said collateral or any part thereof to the transferee, who shall thereupon become vested with all the powers and rights hereinabove given to the holder in respect of said note and collateral, and the holder shall be thereafter forever relieved and fully discharged from any liability or responsibility in connection therewith.

Harry Parker

FORM 68 3M 11-30 I

Date		Paid on a/c	Bal. due	
1/2/31	Pd on a/c	4500.		[illegible]
3/1/32	" "	3650.		[illegible]
3/14/32	" "	3.400.		[illegible]
Date 4/15/32	Paid on a/c $	1500.	Bal. due $ 228.600	[illegible]
Date 4/28/32	Paid on a/c $	2500.	Bal. due $ 226.100.	[illegible]
7/15/32	" "	6.500.	219.600	[illegible]
8/5/33		250	219.350	[illegible]
6/15/34		550.	218.800	[illegible]
12/23/35		1850	216950.	[illegible]
1/4/36		34.55	216,915.45	[illegible]
1/4/36		450	216,465.45	[illegible]
1/15/36		500.	215965.45	[illegible]
10/1/36		503.40	215462.05	[illegible]
10/16/36		50.34	215.411.71	[illegible]
12/4/36		1044.20	214.367.51	[illegible]

[illegible] TRUST COMPANY

[illegible signature]

Vice-Pres.

[illegible signature]

Harry J. [illegible]

$350,000.00 *Philadelphia, Pa.,* May 26, 19 31.

ON DEMAND, for Value Received, I promise to pay to the order of

MYSELF

Three hundred fifty thousand, 00/100 DOLLARS,

with interest, having deposited as collateral security for the payment of this note and of any other liability or liabilities to the holder hereof, due or to become due, or that may be hereafter contracted, whether direct or contingent, and whether now or hereafter acquired, the following property, viz.:

200 Austrian Credit Corp. (American Shares)
430 Blue Ridge Corp. Optional 6% Conv. Pfd.
40 Citizens Traction Company,
200 Davidson Chemical Company,
807 Fire Association of Philadelphia.
3710 Freeport Texas Corporation,
300 General Motors Corp. Common,
50 Lehigh Valley Railroad Company,
4950 Manufacturers' Casualty Insurance Co.
300 Mc Graw-Hill Publishing Co. Common
100 Mc Kesson & Robbins, Inc. Common,
70 Mc Kesson & Robbins, Inc. "A" 7% Pfd.
5180 National Dairy Products Corp. Common

with the right on the part of the holder hereof to repledge the securities above mentioned, or to substitute or exchange for the same other certificates of like tenor and amount, and also from time to time to demand additional collateral security, and upon failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to the holder hereof, or assigns, in case of such default, or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole or any part of such securities, or any substitutes therefor or additions thereto, at any broker's board, or at public or private sale, at the option of the holder, at any time or times thereafter, without advertisement or notice to the undersigned, and with the right on the part of the holder hereof to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption; and after deducting all legal and other costs and expenses of collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said holder hereof shall deem proper, returning the overplus to the undersigned; and the undersigned will still remain liable for any amount so unpaid; it being further understood and agreed that the holder shall have a like lien upon any and all funds, moneys, balances, stocks, bonds, notes, and other property at any time in the hands of the holder belonging to the undersigned, or to any endorser or guarantor hereof, as security for this note and for any and all liability or liabilities to the holder matured or unmatured, or that may be hereafter contracted, whether direct or contingent and whether now or hereafter acquired, of the undersigned or any endorser or guarantor hereof; which lien shall be enforceable in like manner and shall be subject to all the provisions herein above and before mentioned and set out.

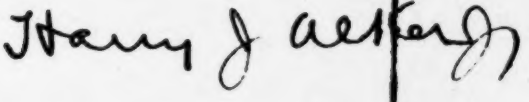
In the event of an application for the appointment of a Receiver for the undersigned or any party hereto, or the making of a general assignment by or the filing of a petition in bankruptcy by or against, the undersigned, or any guarantor or endorser of this note, or any party hereto, or of any other act of insolvency of any of said parties, however expressed or indicated, all the aforesaid liabilities shall without notice, at the option of the holder, become immediately due, without demand for payment thereof.

It is further agreed that upon any transfer of this note, the holder may deliver the said collateral or any part thereof to the transferee, who shall thereupon become vested with all the powers and rights hereinabove given to the holder in respect of said note and collateral, and the holder shall be thereafter forever relieved and fully discharged from any liability or responsibility in connection therewith.

Harry J Aleker Jr

FORM 62 3M 11-30 I

Appendix 2.



FILE COPY

IN THE

Supreme Court of the United States

No. 697.

October Term, 1947.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR REHEARING.

EDWIN HALL, 2ND,
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IN THE

Supreme Court of the United States

No. 697. October Term, 1947

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

On June 18, 1948, your petitioners attempted to file with the Clerk of your Honorable Court a petition for rehearing in the above matter. Petition for certiorari had been denied on May 24, 1948. Your petitioners understood that in accordance with Rule 38 of your Honorable Court they had twenty-five (25) days within which to file a petition for rehearing, your petitioners being unaware of the fact that the Court had modified this rule and that the time was only fifteen (15) days; they having examined their rules in Philadelphia and also made inquiry at the Circuit Court of Appeals in Philadelphia who advised them they had twenty-five days.

Petitioners believe that the Court should permit the petition for rehearing to be filed even though beyond the fifteen-day period. The failure so to do was not intentional, but because they had not received a copy of the amendment and had been misadvised by a clerk of the Circuit Court, and furthermore because your petitioners would have been unable to attach the necessary exhibits and file the petition within the fifteen-day time for the reasons hereinafter stated.

Since filing the petition for certiorari in this matter, your petitioners have been in constant communication with the members of the Banking Committee of both the Senate and the House, who have become greatly interested in this case and feel that the policy which the Court is following in this matter does not truly adhere to the intent of Congress. Therefore, your petitioners have been discussing the matter with the various members of the Banking Committees of both the House and Senate

towards the end that legislation would be introduced to modify Section 264 (s) of the Federal Reserve Act, 12 U.S.C.A. 264 (s). Due to the press of other acts before Congress preceding this, your petitioners were only able to procure the introduction of bills in both Houses on June 9th, which was sixteen days after the petition for certiorari was denied. Therefore within the fifteen-day period it would have been impossible for your petitioners to have attached copies of the Bills which would be necessary for the Court to have before it in connection with the petition for rehearing.

During the discussion of this case by your petitioners with the various members of the Banking Committee of both Houses your petitioners were advised by the members to be sure to keep the matter alive and file whatever petitions were necessary so to do in the event the petition for certiorari then pending would be refused.

Your petitioners therefore submit that the Court should grant leave to file a petition for rehearing even though beyond the fifteen-day period fixed by the present rules of Court because Congress is considering the passing of legislation which would clarify its intentions concerning the policy which the Courts should follow in this matter and the necessary Bills for such legislation were not introduced in both Houses until June 9, 1948, which was after the fifteen-day limit had expired.

Your petitioners therefore pray leave to file the attached petition for rehearing.

Edwin Hall II

EDWIN HALL, II

A. D. BRUCE

HARRY J. ALKER, JR.

Attorneys for Petitioners.

1505 Land Title Bldg.

Philadelphia, Pa.

Harry J Alkers and Mamie Dubas individually and as members of the estate of Angelo A. Dubas dec'd

Harry J Alkers

ORDER

AND NOW, 1948, leave is granted to file the accompanying petition for rehearing of the petitioners' petition for the issuance of a writ of certiorari in the above matter.

BY THE COURT

J.

IN THE

Supreme Court of the United States.

No. 697. Otober Term, 1947.

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners Harry J. Alker, Jr., and Mamie DuBan, Individually and as Executrix of the will of Alfred A. DuBan, deceased, pray that this Court rehear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case, and

RESPECTFULLY REPRESENT:

That on March 25, 1948, your petitioners filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Respondent filed its Brief with your Honorable Court on April 30, 1948.

Your petitioners filed their Reply Brief with your Honorable Court on May 8, 1948.

On May 24, 1948, your Honorable Court refused the certiorari.

The history of the case, questions presented, the statutes and law involved, the specifications of errors and the reasons for granting the writ are set forth in the peti-

tion for certiorari and briefs in support thereof, to which reference is made as well as the record and will not be repeated here.

Reference is also made to the record, the various petitions and the briefs filed in this matter with your Honorable Court as of October Term, 1945, No. 880, which contain further reasons why the writ should be allowed, and are made part hereof by way of reference.

GROUNDS FOR GRANTING THE PETITION.

This is an *equitable* action brought by the Federal Deposit Insurance Corporation to compel the transfer of certain stock belonging to the Estate of Alfred A. DuBan, deceased, and to establish a deficiency judgment against Alker, arising out of Alker's note held by the Integrity Trust Company at Philadelphia, (which company was insured by the Federal Deposit Insurance Corporation). This note was accompanied by certain collateral, part whereof belonging to the DuBan Estate. An oral agreement as to forbearance had been made as to this note by the trust company with Alker and DuBan at the time of deposit in 1931 and was subsequently extended in 1936 to 1946 by the trust company. The Federal Deposit Insurance Corporation after recognizing the agreement for more than two years after it took over the trust company and accepting the benefits of the agreement, suddenly repudiated the agreement and sold all the collateral to itself while Alker was seriously ill in a hospital and Mrs. DuBan, who is blind, was also ill—all at great loss to DuBan and Alker. The District Court decided in favor of the Federal Deposit Insurance Corporation, holding that, although there was no fraud in the transaction, still the agreement was unenforceable because it lacked definiteness as to time—this despite the fact that an offer of proof to establish the certainty and limit of time had been made at the trial but refused by the Trial Judge—all of which will appear by the record. On an appeal to the Circuit Court, the latter

sustained the District Court, brushing aside all other reasons, however, and basing its opinion solely as a matter of law on the decision of your Honorable Court in the case of D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation, 315 U. S. 447, which case was a pure fraud case and bore no resemblance to the case at bar; the Circuit Court specifically referring in its opinion to Sec. 12 B (s) of the Federal Reserve Act, 12 U. S. C. A. 264 (s), which is a statute imposing criminal liability for wilful false statements concerning any matter involving Federal Deposit Insurance Corporation—all this notwithstanding the fact that the record showed that there was no fraud or false statements made and the District Court had so found.

A petition for certiorari from this decision of the Circuit Court was filed with your Honorable Court and refused.

Subsequently a material witness was located and important evidence discovered which was not known to be in existence at the trial. Application was made to the District Court for a new trial. In view of the fact that the Circuit Court had based its opinion on the D'Oench, Duhme case as a matter of law the District Court felt that application should be made to the Circuit Court of Appeals for leave to the District Court to hear the motion for new trial. Upon application to the Circuit Court for such leave to the District Court, the Circuit Court—instead of acting upon the petition, held a hearing, took testimony like a trial court, and refused the motion. This prevented the District Court from hearing the matter.

A petition for certiorari was then filed with your Honorable Court asserting that the Circuit Court had exceeded its authority and that it was a Court of Review and not one to hear testimony. The only reported case in which a Circuit Court was permitted to so act was Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238, which case was exceptional in that there had been perpetrated in that case on that particular Third Circuit Court a fraud. As hereto-

fore stated there was no fraud here either on the District Court or the Circuit Court, and that case could be no justification for such action by the Circuit Court. Your petitioners averred they were denied their right to due process of law by such action of the Circuit Court; and further averred that the Circuit Court had failed to even make a complete record in the matter; a number of the exhibits offered in evidence being missing and were not and are not now before this Court.

The Circuit Court was wrong in the first instance in applying the D'Oench, Duhme decision to this case, and secondly, taking testimony, conducting a trial and deciding the case like a trial court instead of remitting the same to the District Court to hear and decide.

The Circuit Court erred again in ignoring the finding of the District Court that there was no fraud.

The record of the action of the Circuit Court on this hearing filed with your Honorable Court is incomplete as various exhibits filed with it are missing. These missing exhibits must be somewhere in the files of the Circuit Court of Appeals.

As set forth in our petition for certiorari the record clearly showed that this transaction was one that was beneficial to the banking institution and there was no fraud of any kind attached to it. The banking officials admitted there was an agreement. The supplemental record shows that there was a notation of it among the files of the bank and that the bank examiners were advised of the agreement and had agreed with the banking officials that it was advantageous to the bank to make the same. On the original trial some of the records were missing. These were subsequently located and were before the Circuit Court at the time of the hearing. How long the records so produced were in the bank, petitioners could not tell exactly as they had no access to the same. They were there and the record shows they were there at least six weeks and probably a great deal longer. The Circuit Court erred in the opinion

and said six days instead of six weeks. It further held that under the D'Oench, Duhme decision every transaction must in every detail appear on the records of the bank to be binding upon the Federal Deposit Insurance Corporation. The customer of the bank should not be penalized for the failure of the bank to so do as it is impossible for the customer to ascertain or control what the bank does.

However, in this case, a notation plainly appeared on the original notes and another notation appeared on the renewal note as will all appear in the record with your Honorable Court. The record further shows that the bank examiners must have seen the notation as the old notes were there when they suggested that the original notes were stale, being five years or more old, and a new note required and given. The record also shows that petitioners offered proof that the old notes bearing the endorsement were in the possession of the bank for six weeks at least after the execution and delivery of the new note. The record also shows that the bank placed upon the new note the unusual notation that appears on it because of the notation on the original notes, and the agreement relating thereto, so that the new note could be tied up distinctly to the original notes, the notations thereon and the agreement relating thereto. At the time of the trial before the District Court, bankers who appeared as witnesses said the endorsement on the new note was of such an unusual nature that it was notice to every one that an agreement existed as to the note. The record submitted with this petition shows that the former examiner (and the Federal Deposit Insurance Corporation relied upon the examiners entirely) were advised by the bank officials of the existence of an agreement and discussed the same with them several successive years.

It is submitted that had all this been submitted to the District Court for hearing, the District Court could not do other than grant a new trial, all of the evidence being after-discovered and material. Instead, the Circuit Court erred in trying the case and again applying the D'Oench, Duhme decision, thereby depriving the petitioners of an oppor-

tunity to be heard in the proper tribunal and of their right to due process of law.

Petitioners have been advised by various Congressional leaders that Congress never so intended, and never intended the Court to lay down any such public policy against debtors when no fraud or concealment had been practiced against the bank or the Federal Deposit Insurance Corporation. Congress has become alive to this decision and the dangers arising from it, and to permit the decision of the Circuit Court to stand would make the transaction of the usual banking business impossible, and no honest debtor would ever be able to set up a defense of any kind whatsoever against the Federal Deposit Insurance Corporation, if and, when it should decide to sue any one, anywhere in the entire country. These leaders say Congress intended the Federal Deposit Insurance Corporation to be protected where there was fraud, but not where no fraud is concerned. Bills—copies of which are attached hereto and made part hereof—which are made effective as of August 23, 1935—were therefore, because of the Circuit Court's decision in this case, introduced in both the Senate and the House, and are now being considered by the Banking Committees of both Houses. The purpose of these acts is to clarify the original intent of Congress which was that the provision of the Banking Act upon which the Circuit Court relied in this case only should apply to fraud cases, and further that the Federal Deposit Insurance Corporation should occupy no higher position than the insured bank itself as to assets taken over, irrespective of the method adopted by the Federal Deposit Insurance Corporation to secure possession of such assets.

In this case the bank was kept open several days longer than intended in order that the Federal Deposit Insurance Corporation might try to place itself in the position of an innocent holder for value rather than an ordinary assignee (the insurer) taking over assets from the insured bank to secure it for money advanced under the insurance policy.

This was an unfair advantage the Federal Deposit Insurance Corporation attempted to secure, which Congressional leaders say was never intended by Congress.

Furthermore, the Federal Deposit Insurance Corporation in this instance in taking over the assets did not do so for itself alone, but did it for itself and a number of banking institutions which had also made loans to the bank (the Federal Deposit Insurance Corporation acting as liquidator for itself and said banking institutions) which banking institutions had long had representatives on the Board and the Executive Committee of the bank and had approved the bank's agreement relating to the loan which the Federal Deposit Insurance Corporation attempted to repudiate.

It is submitted, therefore, that the petitioners have been denied due process of law, being deprived of the right to have the proper tribunal hear the after-discovered evidence submitted or to be submitted, and because thereof, will suffer irreparable damage, and further, that the Circuit Court erred in applying the D'Oench, Duhme case to this case.

WHEREFORE, it is urged that a rehearing be granted and the order denying the petitioners' petition for a writ of certiorari be reconsidered, and after such reconsideration, the writ of certiorari be granted; or that the Court defer acting upon the same until Congress, whose duty it is to lay down the policy of the law, has a full opportunity to pass upon the said acts and declare its intent inasmuch as the right of these petitioners to the benefits they would otherwise be entitled by reason of said act would be lost—which would be unfair to the petitioners and deprive them of the rights to which they are justly entitled; it having always been the contention of the petitioners that Congress never intended Section 12 B (s) of the Federal Reserve Act, 12 U. S. C. A. 264 (s), (*relied upon by the Circuit Court*) to apply to anything but a fraud case, and further

contending that the D'Oench, Duhme case (also relied upon by the Circuit Court) was never intended to apply to any case where there was no fraud.

The undersigned, the counsel of record for the petitioners, certify that this petition for a rehearing is presented in good faith and not for the purposes of delay.

Respectfully submitted,

EDWIN HALL, 2ND,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.

We hereby certify that the foregoing petition is presented in good faith and not for delay. The petition is restricted to the grounds specified in the rule of Court as amended.

EDWIN HALL, II
A. D. BRUCE,
HARRY J. ALKER, JR.
Counsel

80TH CONGRESS
2D SESSION

S. 2817

IN THE SENATE OF THE UNITED STATES

JUNE 7 (legislative day, JUNE 1), 1948

Mr. MARTIN introduced the following bill; which was read twice and referred to the Committee on Banking and Currency

A BILL

To amend section 12B of the Federal Reserve Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (s) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec. 264 (s)), is amended by inserting before the period a colon and the following: "*Provided,* That nothing herein shall be construed as prohibiting any bona fide transaction between an insured bank and a customer where there is an absence of fraud, and any claim of the Corporation on any note acquired from an insured bank in any capacity whatsoever shall be subject to all defenses available to such bank under the laws

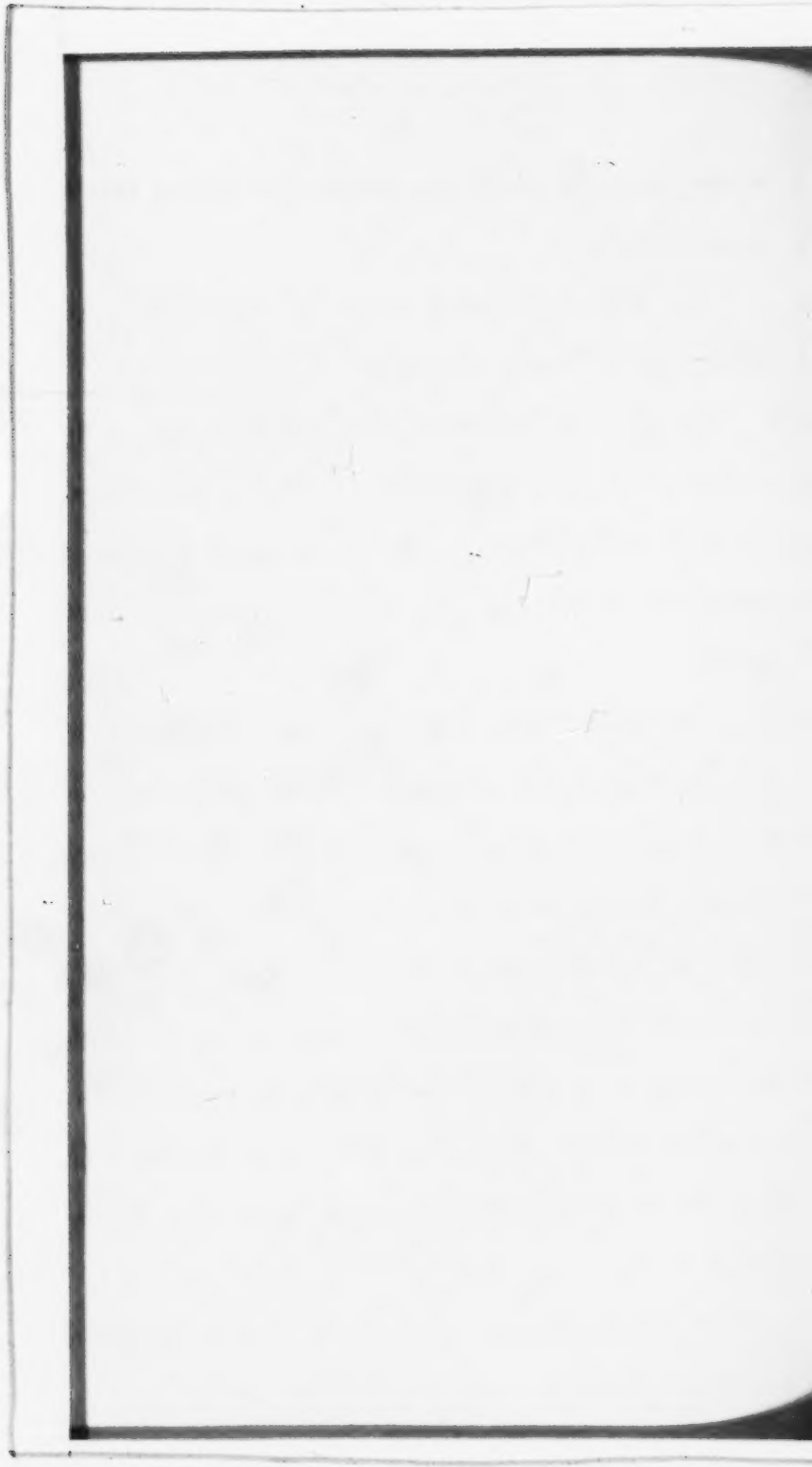
of the State in which the transaction giving rise to such claim occurred".

(b) The amendment made by this section shall be effective as of August 23, 1935.

SEC. 2. (a) Subsection (y) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec. 264 (y)), is amended by inserting at the beginning of such subsection "(1)" and adding a new paragraph thereto as follows:

"(2) Notwithstanding any other provision of this section, the relationship with respect to all transactions between the corporation and an insured bank is that of insurer and insured. Except in cases of actual fraud, all defenses that might be raised against an insured bank may be raised against the Corporation with respect to any obligation or other property acquired by it directly or indirectly from an insured bank irrespective of the form or method the Corporation may adopt to acquire the same, or to assist the insured bank."

(b) The amendment made by this section shall be effective as of August 23, 1935.



80TH CONGRESS
2D SESSION

H. R. 6853

IN THE HOUSE OF REPRESENTATIVES

JUNE 9, 1948

Mr. MCCONNELL introduced the following bill; which was referred to the Committee on Banking and Currency

A BILL

To amend section 12B of the Federal Reserve Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (s) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec.. 264 (s), is amended by inserting before the period a colon and the following: "*Provided*, That nothing herein shalll be construed as prohibiting any bona fide transaction between an insured bank and a customer where there is an absence of fraud, and any claim of the Corporation on any note acquired from an insured bank in any capacity whatsoever shall be subject to all defenses available to such bank under

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(b) The amendment made by this section shall be effective as of August 23, 1935.